(1)
Supreme Court, U.S.
FILED
941076 DEC 14 1994
OFFICE OF THE CLERK

NO.

IN THE

Supreme Court of the United States

OCTOBER 1994 TERM

WENDY RITZ, IN HER INDIVIDUAL CAPACITY AS ASSISTANT ATTORNEY GENERAL FOR THE STATE OF COLORADO,

Petitioner,

v.

CARY JAMES GAGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Alan Epstein
David R. Brougham
of HALL & EVANS, L.L.C.
1200 - 17th Street, Suite 1700
Denver, Colorado 80202
(303) 628-3300
Attorneys for Petitioner

50 pp

QUESTION PRESENTED

1. Whether an Assistant Attorney General for the State of Colorado is entitled to absolute prosecutorial immunity for conduct undertaken as an advocate on behalf of the State in a habeas corpus proceeding.

PARTIES TO THE PROCEEDING

The names of the parties to the proceeding appear in the caption of this petition, except for co-defendant Gale Norton, Attorney General for the State of Colorado. The United States Court of Appeals for the Tenth Circuit's opinion affirmed the district court's dismissal of plaintiff's complaint against Ms. Norton. Ms. Norton is therefore not a party to this petition for writ of certiorari.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINION BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE PETITION	8
A. The Assistant Attorney General for the State of Colorado Is Entitled to Absolute Prosecutorial Immunity for Conduct Undertaken as an Advocate on Behalf of the State in a Habeas Corpus Proceeding	8
CONCLUSION	11

TABLE OF AUTHORITIES

CASES

	PAGE
Abel v. Tinsley, 338 F.2d 514 (10th Cir. 1964)	10
Briscoe v. LaHue, 663 F.2d 713 (7th Cir. 1981)	9
Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991)	9
East Coast Novelty Co., Inc. v. City of New York, 809 F.Supp. 285, 291 (S.D.N.Y. 1992)	9
Engle v. Isaac, 456 U.S. 107, 129 (1982)	3
Gagan v. Gunter, 1994 WL 108935 (10th Cir. 1994)	5, 11
Gagan v. Norton, 35 F.3d 1473 (10th Cir. 1994)	1, 7, 10
Heidelberg v. Hammer, 577 F.2d 429 (7th Cir. 1978)	9
Hilton v. Braunskill, 481 U.S. 770, 107 S.Ct. 2113, 95 L.Ed.2d. 724 (1987)	10
Houston v. Partee, 978 F.2d 362 (7th Cir. 1992)	9
Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)	8, 10, 11
Lerwill v. Joslin, 712 F.2d 435 (10th Cir. 1983)	9
Meade v. Grubbs, 841 F.2d 1512, 1532 (10th Cir. 1988)	10
Newcomb v. Ingle, 944 F.2d 1534, 1536 (10th Cir. 1991)	9

	PAGE
Pachaly v. City of Lynchburg, 897 F.2d 723, 727-28 (4th Cir. 1990)	9
People v. Gagan, No. 88CA0916, 88CA0982 (Colo. App. May 24, 1990) (not selected for official publication), *cert. denied*, November 13, 1990	1
Pfeiffer v. Hartford Fire Ins. Co., 929 F.2d 1484, 1489 (10th Cir. 1991)	10
Rose v. Lundy, 455 U.S. 509 (1982)	6
Sawyer v. Smith, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990)	11
Schrob v. Catterson, 948 F.2d 1402 (3rd Cir. 1991)	9
Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990)	9
Webster v. Gibson, 913 F.2d 510 (8th Cir. 1990)	9, 10, 12

STATUTES AND OTHER AUTHORITIES

28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	6
42 U.S.C. § 1983	6, 9, 10
U.S. Sup. Ct. Rule 10.1(a) and (c)	12

OPINION BELOW

1. The decision of the United States Court of Appeals for the Tenth Circuit has been published at 35 F.3d 1473 (10th Cir. 1994).

JURISDICTION

The Tenth Circuit issued its opinion reversing in part the district court's order of dismissal on September 16, 1994. This Court retains jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Gagan's State Court Criminal Case

In 1988, respondent, Cary James Gagan ("Gagan") was convicted of theft, criminal attempt to commit theft and criminal impersonation in the District Court of Arapahoe County, Colorado. He appealed his convictions to the Colorado Court of Appeals. In 1990, the convictions were affirmed in *People v. Gagan*, No. 88CA0916, 88CA0982 (Colo. App. May 24, 1990) (not selected for official publication), *cert. denied*, November 13, 1990. Petitioner Wendy Ritz ("Ritz"), an Assistant Attorney General, represented the People of the State of Colorado in the appeal.

2. Gagan's Habeas Corpus Proceeding In The United States District Court For The District Of Colorado, Civil Action No. 91-C-0005

On January 7, 1991, Gagan filed a petition for writ of habeas corpus in the United States District Court for the District of Colorado in Civil Action No. 91-C-0005 naming Frank Gunter (Executive Director of the Colorado Department of Institutions) and the Attorney General of the State of Colorado (Gale Norton) as respondents. On February 11, 1991, the respondents, represented by Ritz, filed an answer. On March 4, 1991, Magistrate Judge Richard Borchers ordered the clerk of the district court of Arapahoe County to file the state trial court record with

the clerk of the United States District Court for the District of Colorado.

On March 22, 1991, Gagan filed a *pro se* motion for preparation of transcripts at state expense in the district court of Arapahoe County (dated March 18, 1991) in Criminal Case Nos. 86 CR 539/86 CR 451 requesting that certain transcripts be prepared "for a fair determination of the U.S. District Court (Colorado) of the Defendant's denial of speedy trial claims." Although Gagan sent a copy of the motion to Ritz, Ritz sent the motion to the Arapahoe County District Attorney's Office because:

> the District Attorney's Office represents the interests of the People at the state trial court level. The Attorney General's Office was not a party to the proceedings in Arapahoe County . . . .

On the same day, March 22, 1991, Judge Joyce S. Steinhardt of the District Court of Arapahoe County granted Gagan's *pro se* motion by handwriting "Motion for Preparation of Transcripts granted" on the first page of the motion. Judge Steinhardt, however, did not set a deadline for the preparation of the transcripts. Furthermore, there was no indication in the handwritten order that Judge Steinhardt served, or caused to be served, the handwritten order on Norton or Ritz.

In July 1991, the clerk of the district court in Arapahoe County filed a "Notice of Record Certified to the Appellate Court" in the habeas corpus proceeding. The notice stated:

> You and each of you will take notice that the Reporter's Transcripts (4) . . . has been duly certified and mailed to the Clerk of the U.S. District Court on the 19th day of July, 1991 A.D.

Through the federal public defender, Gagan filed a motion to complete record in the habeas corpus proceeding on November 7, 1991. The motion indicated that transcripts from several proceedings in the state trial court had not been included in the

record transmitted to the United States District Court. The motion, however, did not disclose that Judge Steinhardt had granted the *pro se* motion for preparation of transcripts at state expense in Gagan's state criminal cases.

By order dated November 8, 1991, Judge Jim R. Carrigan granted in the habeas corpus proceeding Gagan's motion to complete record and ordered the respondents to complete the record by supplying various state court transcripts. (Exhibit F) On January 15, 1992, respondents in the habeas corpus proceeding, through Ritz, filed a status report and motion for reconsideration which stated in part:

> 3. The Respondents tracked down the court reporters who recorded these hearings and discovered that the transcripts requested were never transcribed as part of the state court proceedings. Thus, they were not part of the record reviewed by the state courts.
>
> 4. Given the unique circumstances of this case, the Respondents now ask this Court to reconsider its order to produce the records, and relieve Respondents of the responsibility to produce the transcripts by discharging that order.
>
> 5. The Petitioner's attack on his state court convictions is based in part on a record that was never made available to the Colorado Court of Appeals. This constitutes a failure to exhaust state remedies as well as an unacceptable bypass of the state judicial system. The Petitioner's procedural default in not providing these transcripts to the Colorado courts bars federal courts from considering these transcripts absent a showing of cause and prejudice. *Engle v. Isaac,* 456 U.S. 107, 129 (1982). Therefore, it is the Respondents' position that the additional transcripts are not necessary for resolution of this case, and should not be considered by this Court.
>
> 6. If this Court should nonetheless determine that the requested transcripts are necessary for its consideration of

> this case, the Respondents request that this Court pay for preparation of the transcripts. Since the Petitioner requested the transcripts he should pay for them; however, he is indigent.

On January 23, 1992, Gagan, through the federal public defender, filed a response to this status report which stated in part:

> 3. Counsel suggests that the Court order preparation and filing of the requested transcripts . . . .
>
> 4. When counsel made the request to supplement the record, counsel was unaware that certain transcripts had not ever been prepared. In terms of arranging payment for transcripts, counsel will be happy to prepare the necessary transcript order forms and CJA vouchers.

Gagan's response did not refer to Judge Steinhardt's March 22, 1991 order.

By March 25, 1992, the federal district court in the habeas corpus proceeding had not entered an order regarding the respondents' motion for reconsideration. On March 25, 1992, however, Judge Deanna E. Hickman entered an order in Criminal Case No. 86 CR 451 in Arapahoe County which stated, in part:

> This Judge was informed by court reporter Janice Hibbard on March 23, 1992, that she stood ready, willing and able to transcribe these proceedings and had already pulled her notes to do so, but that she had been instructed by Assistant Attorney General Wendy Ritz not to comply with Chief Judge Steinhardt's order and instructed not to prepare the transcripts. In a telephone conversation between this Judge and Ms. Ritz on March 24, 1992, Ms. Ritz confirmed this; to wit, that she did not think these transcripts were necessary and that she instructed the court reporter not to prepare court ordered transcripts. She never notified this Court

> of her instruction and this Court was under the impression that transcript were being prepared.

(Exhibit D) Judge Hickman ordered that "Ritz cease and desist from further interference or countermanding of orders of the District Court, Arapahoe County" and ordered that the transcripts be prepared within 30 days.

Apparently, when Judge Hickman entered the March 25, 1992 order, she was not aware of the existence or contents of the January 15, 1992 status report and motion for reconsideration filed in the habeas corpus proceeding by Ritz.

After learning of Judge Hickman's order, Ritz filed a motion to withdraw the motion for reconsideration in the habeas corpus proceeding on March 30, 1992. In conjunction with this motion, Ritz submitted an affidavit which stated that she had been unaware of Judge Steinhardt's order regarding preparation of the transcripts at the time she contacted the court reporters in connection with her representation of the respondents in the habeas corpus proceeding, and that her actions in this regard were focused on Judge Carrigan's order in the habeas corpus proceeding. (Exhibit G)

Judge Hickman subsequently entered an order on June 1, 1992, which stated that " . . . in light of [Ritz's]statement that [she was] unaware of Judge Steinhardt's order, the Court will withdraw its [March 25, 1992] opinion in part. All of the Order will be withdrawn except that portion ordering transcripts prepared within 30 days." (Exhibit E)

By July 24, 1992, the state court transcripts requested by Gagan were filed in the habeas corpus proceeding. On or about May 7, 1993, the federal district court dismissed Gagan's petition for writ of habeas corpus. The dismissal was affirmed by the United States Court of Appeals for the Tenth Circuit in Case No. 92-1253 on March 31, 1994. *Gagan v. Gunter*, 1994 WL 108935 (10th Cir. 1994).

3. Gagan's Civil Action Against Norton And Ritz

On April 7, 1992, Gagan filed his complaint against Norton and Ritz alleging a violation of 42 U.S.C. § 1983. The United States District Court for the District of Colorado exercised jurisdiction pursuant to 28 U.S.C. § 1331. In essence, Gagan contended that sometime between June 1, 1991 and July 1, 1991, "Ritz informed court reporter Janice Hibbard not to comply with Chief Judge Steinhardt's order to prepare transcripts of court hearings." Norton and Ritz filed a motion to dismiss Gagan's complaint.

On February 5, 1993, the recommendation of United States Magistrate Judge O. Edward Schlatter was entered. (Exhibit C) In the recommendation, the Magistrate Judge found:

> At the time Ms. Ritz is alleged to have told the court reporter not to prepare the transcripts, Ms. Ritz was the attorney of record for the state of Colorado in Mr. Gagan's federal corpus action. When Mr. Gagan asked the state court to order preparation of the transcripts, the federal habeas case was the only pending action to which the transcripts might have been relevant. Mr. Gagan's motion for preparation of the transcripts refers repeatedly to his need for the transcripts in the federal habeas proceeding and mentions only obliquely the possibility of seeking post-conviction relief in state court.
>
> There is no question that the preparation of the transcripts was directly related to the federal habeas case. The fact that the transcripts in question had not been part of the record in Mr. Gagan's state court appeal does raise some question as to whether the transcripts could properly be considered in a federal habeas action. *See Rose v. Lundy*, 455 U.S. 509 (1982) (federal habeas court should not consider claims unless state courts have had an opportunity to consider same claims.) Thus, for the purpose of the federal habeas

> action, there was a legitimate question of whether the transcripts needed to be prepared. In such circumstances, it is common for attorneys to work with court reporters to coordinate when, or whether, transcripts should be prepared. Ms. Norton's and Ms. Ritz's alleged actions with regard to the transcripts, whether proper or not, were intimately associated with their roles as advocates for the state of Colorado in the federal case. Thus, absolute immunity protects Ms. Norton and Ms. Ritz from liability for money damages based on these actions.

Judge Zita L. Weinshienk of the United States District Court for the District of Colorado then entered the order of dismissal finding:

> Since the transcripts in question had not been part of the record in the state court appeal, there was a legal question as to whether the transcripts could be considered in a federal habeas action. Therefore any alleged action on the part of Ms. Norton or Ms. Ritz with regard to the transcripts would be associated with their role as advocates for the state of Colorado in the federal habeas case.

(Exhibit B) Because Judge Weinshienk ruled that Norton and Ritz "are protected by prosecutorial immunity for such actions," Gagan's complaint was dismissed with prejudice.

The United States Court of Appeals for the Tenth Circuit reversed in part and remanded. (Exhibit A) The court affirmed the trial court's dismissal of Gagan's complaint against Norton. 35 F.3d at 1476, n.4. However, the court reversed the district

court's determination that Ritz was entitled to absolute immunity and remanded for a determination whether she was entitled to qualified immunity.[1]

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

A. The Assistant Attorney General for the State of Colorado Is Entitled to Absolute Prosecutorial Immunity for Conduct Undertaken as an Advocate on Behalf of the State in a Habeas Corpus Proceeding

In *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), this Court first addressed the issue whether a state prosecuting attorney who acts within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to suit under 42 U.S.C. § 1983 for alleged deprivations of a defendant's constitutional rights. The Court determined that the same considerations that underlie the common law immunities of judges and which grant jurors acting within the scope of their duties absolute immunity should extend to state prosecutors. These considerations included the concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. 96 S.Ct. at 991. This Court held that in initiating a prosecution and in presenting the state's case, the prosecutor is immune from a civil suit for damages under § 1983. 96 S.Ct. at 995.

The *Imbler* progeny has extended prosecutorial immunity to a variety of situations deemed by the courts to be intimately associated with the judicial process. Generally, *Imbler* extends absolute immunity to prosecutors from civil suits for damages

---

[1] The court also remanded with directions that the district court determine whether Gagan's motion for leave to amend his complaint to join the court reporters as additional defendants should be granted.

based on acts performed within the scope of the prosecutor's function as an advocate. *Briscoe v. LaHue*, 663 F.2d 713 (7th Cir. 1981). *See, e.g., Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991) (absolute immunity extends to prosecutor in probable cause hearing); *East Coast Novelty Co., Inc. v. City of New York*, 809 F.Supp. 285, 291 (S.D.N.Y. 1992) (drafting and obtaining search warrant to confiscate property); *Schrob v. Catterson*, 948 F.2d 1402 (3rd Cir. 1991) (alleged failure to investigate before initiating prosecution); *Heidelberg v. Hammer*, 577 F.2d 429 (7th Cir. 1978) (allegation that prosecutors induced witnesses to commit perjury); *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983) (pressing charges without proper jurisdiction); *Pachaly v. City of Lynchburg*, 897 F.2d 723, 727-28 (4th Cir. 1990) (participating in a post-indictment search); *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991) (failure to prosecute after charges filed).

It is only where the prosecutor's function can be characterized as administrative or investigative that only qualified, as opposed to absolute, immunity extends to his activities. *See Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1990); *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992); *see also Burns v. Reed, supra* (absolute immunity does not extend to a prosecutor's imparting legal advice to police officers).

The case which appears to extend absolute prosecutorial immunity to factual circumstances most closely analogous to those presented here is *Webster v. Gibson*, 913 F.2d 510 (8th Cir. 1990). In *Webster* the plaintiff prisoner brought civil rights actions pursuant to 42 U.S.C. § 1983 against a prosecutor, sheriff, and deputy sheriff for allegedly depriving him of a prompt judicial determination of probable cause. With respect to the prosecutor, the plaintiff alleged that he had exceeded the scope of his prosecutorial duties when he allegedly disregarded a state circuit judge's order to file an information or release the plaintiff. The plaintiff alleged that by so "countermanding" a state court order, the prosecutor stepped outside the bounds of his advocacy function and lost the absolute immunity he would

otherwise have enjoyed. The United States Court of Appeals for the Eighth Circuit disagreed. The Court held:

> [Plaintiff's] allegation that the prosecutor disregarded a court order to file an information would not place him outside the scope of his prosecutorial duties. Thus, we conclude the district court was correct in finding that the prosecutor had absolute immunity, and [plaintiff's] section 1983 action insofar as it contained allegations against the prosecutor was properly dismissed.

913 F.2d at 514.

Petitioner submits that the flaw in the Tenth Circuit's reasoning in this case stems from its focus on Gagan's allegation that Ritz "countermanded" a state court judge's order directing a court reporter to prepare transcripts, and ignores the context in which this alleged conduct occurred. The court held:

> Applying these principles to this case, we cannot agree with the district court that a prosecutor's actions in allegedly countermanding a state court judge's order directing a court reporter to prepare transcripts for use by an indigent pro se litigant in the civil action, constitutes the type of conduct protected by absolute immunity under *Imbler* and its progeny.

35 F.3d at 1476. What this holding neglects to address is that the civil action in which the *pro se* litigant intended to use the transcripts is the habeas corpus proceeding in which Ritz was representing the Office of the Attorney General of the State of Colorado, a function which is simply the latter or appellate stage of the judicial phase of a criminal prosecution.

Absolute immunity extends to government attorneys who conduct and defend civil actions. See, e.g., *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1489 (10th Cir. 1991); *Meade v. Grubbs*, 841 F.2d 1512, 1532 (10th Cir. 1988). Habeas corpus is a civil proceeding, *Hilton v. Braunskill*, 481 U.S. 770, 107 S.Ct. 2113, 95 L.Ed.2d. 724 (1987); *Abel v. Tinsley*, 338 F.2d 514 (10th Cir. 1964), the purpose of which is to inquire into the legality of a

prisoner's detention. *See Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). Ritz's representation of the Office of Attorney General in *Gagan v. Frank Gunter and Attorney General for the State of Colorado* was, obviously, undertaken in her advocacy function as Assistant Attorney General for the State of Colorado, and arose out of her previous representation of the State in the state criminal case against Gagan. The fact that her alleged conduct in instructing court reporters not to prepare a transcript requested by Gagan for use in that habeas corpus proceeding purportedly countermanded a collateral state court order is of no consequence. Whether Ritz requested the court reporters to refrain from preparing the transcripts with or without knowledge of Judge Steinhardt's order, her actions in this regard were directed exclusively to the habeas corpus proceeding in her capacity as advocate for the Attorney General for the State of Colorado, and not for any other conceivable administrative or investigative purpose. Consequently, the same considerations which underlie the extension of prosecutorial immunity to all other advocacy functions in criminal and civil proceedings of necessity extend to Ritz's advocacy function in the habeas corpus proceeding. *See Imbler v. Pachtman, supra, Webster v. Gibson, supra.*

Therefore, petitioner respectfully submits that the United States Court of Appeals for the Tenth Circuit's decision is erroneously reasoned, conflicts with this Court's decision in *Imbler v. Pachtman, supra*, and must be reversed.

CONCLUSION

Petitioner's petition for writ of certiorari presents an apparent issue of first impression, i.e., whether a state prosecutor's actions undertaken as an advocate for the state attorney general's office in a habeas corpus proceeding is entitled to absolute prosecutorial immunity. The United States Court of Appeals for the Tenth Circuit's decision refusing to extend this immunity conflicts with the rationale set forth by this Court in *Imbler v. Pachtman, supra.* An attorney general representing the state in a

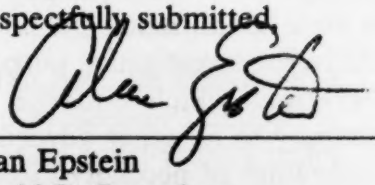
habeas corpus proceeding is no less subject to harassment by unfounded litigation, and no less likely to shade her decisions instead of exercising the independence of judgment required by her public trust, than she would be in any other criminal or civil proceeding while performing her advocacy functions.

The Tenth Circuit's decision also conflicts with the United States Court of Appeals for the Eighth Circuit's decision in *Webster v. Gibson, supra,* to the extent the Tenth Circuit premised its decision on the allegation that the Assistant Attorney General "countermanded" a court order.

Consequently, petitioner submits that certiorari review is imperative. U.S. Sup. Ct. Rule 10.1(a) and (c).

Dated this 14th day of December, 1994.

Respectfully submitted,



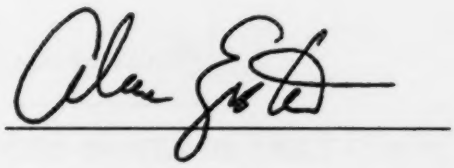
Alan Epstein
David R. Brougham
of HALL & EVANS, L.L.C.
1200 - 17th Street, Suite 1700
Denver, Colorado 80202
303/628-3300

Attorneys for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of December, 1994 a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

Cary James Gagan
General Delivery/U.S.P.O.
Cherry Creek Station
Denver, Colorado 80206



APPENDIX A

United States Court of Appeals

FOR THE TENTH CIRCUIT

CARY JAMES GAGAN,

Plaintiff-Appellant,

v.

GALE NORTON, in her individual capacity as Attorney General for the State of Colorado;
WENDY RITZ, in her individual capacity as Assistant Attorney General for the State of Colorado,

Defendants-Appellees.

No. 94-1132

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 92-Z-655)

Submitted on the briefs:*

Cary James Gagan, pro se.

David R. Brougham and LaDonne Bush of Hall & Evans, L.L.C., Denver, Colorado, for defendants-appellees.

Before TACHA, BRORBY, and EBEL, Circuit Judges.

BRORBY, Circuit Judge.

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Gagan, a pro se litigant, appeals the decision of the district court dismissing his 42 U.S.C. § 1983 complaint against the defendants, who are the Attorney General and an Assistant Attorney General of the State of Colorado, on the grounds that the defendants were entitled to absolute immunity for their actions in allegedly[1] countermanding the order of a Colorado state court. We affirm with respect to the Attorney General, albeit for different reasons than those given by the district court, but we reverse and remand as to the Assistant Attorney General.

BACKGROUND

In 1988, Mr. Gagan was convicted of theft, criminal attempt to commit theft and criminal impersonation in the District Court for Arapahoe County, Colorado. With the assistance of appointed counsel, Mr. Gagan appealed his conviction to the Colorado Court of Appeals. The State of Colorado was represented by defendant Wendy Ritz, an Assistant Attorney General. On May 24, 1990, the Colorado Court of Appeals affirmed his conviction, and the Colorado Supreme Court denied review on November 11, 1990.

Dissatisfied with appellate counsel's failure to raise an issue relating to an alleged violation of his right to a speedy trial, Mr. Gagan filed a pro se action in federal court on January 7, 1991 seeking a writ of habeas corpus. In order to prepare for that action, he filed an ex parte pro se motion in state court requesting that certain transcripts be prepared at the government's expense. On March 22, 1991, the state court judge granted the motion for transcripts by simply endorsing the motion itself.

---

[1] The case is before us on the district court's order granting the defendants' motions to dismiss pursuant to Rule 12(b)(6). Therefore, we "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991); *see also Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1566 (10th Cir. 1993). In addition, because the plaintiff is proceeding pro se, we must construe his pleadings liberally. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972).

Mr. Gagan alleges that defendant Ritz thereafter allegedly ordered the court reporter not to prepare the transcripts, notwithstanding the state court judge's order to the contrary, because she believed his petition should be dismissed on procedural grounds.[2] The state court judge termed the defendant's conduct "outrageous" and ordered the Attorney General's office to cease and desist from ever similarly proceeding.

The transcripts at issue were ultimately prepared in July of 1992, and the district court thereafter dismissed Mr. Gagan's petition, a decision that we affirmed. *See Gagan v. Gunter,* (unpublished Order & Judgment), 21 F.3d 1121 (10th Cir. Mar. 31, 1994).

The gist of the plaintiff's complaint in this § 1983 case is that the defendants' actions in countermanding the state court judge's order to prepare the transcripts was essentially a violation of his "constitutional" right of access to the courts. *See Bounds v. Smith,* 430 U.S. 817 (1977).[3] The district court below relied upon our decisions in *Pfeiffer v. Hartford Fire Ins. Co.,* 929 F.2d 1484 (10th Cir. 1991), and *Snell v. Tunnell,* 920 F.2d 673 (10th Cir. 1990), *cert. denied,* 111 S. Ct. 1622 (1991), which interpreted, *inter alia, Imbler v. Pachtman,* 424 U.S. 409 (1976), and concluded that the defendants' actions as state prosecutors were covered under the protective umbrella of absolute immunity. *See* Order of Dismissal, Jan. 14, 1994 at 3.

---

[2] In *Rose v. Lundy,* 455 U.S. 509 (1982), the Supreme Court adopted a "total exhaustion rule" for so-called "mixed" petitions — those containing both exhausted and unexhausted claims — for a writ of habeas corpus. *Id.* at 522. Because Mr. Gagan's speedy trial claim was unexhausted, it was arguably subject to dismissal under *Rose.*

[3] The plaintiff's complaint alleges various other constitutional violations including due process, equal protection, and the First and Eighth Amendment. While we perceive the issue to be primarily one implicating the right of access, we express no opinion as to the other constitutional claims asserted, and we leave that for the district court to consider in the first instance.

DISCUSSION

I.

We review *de novo* a district court's conclusion on the question of absolute immunity. *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985), quoted in *Snell,* 920 F.2d at 675. Because the matter is before us on the district court's order granting a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), we accept the allegations of the complaint as true. *Doyle,* 998 F.2d at 1566.

State prosecutors are entitled to absolute immunity against suits brought pursuant to § 1983 for activities "'*intimately associated* with the judicial . . . process,'" such as initiating and pursuing criminal prosecutions. *Pfeiffer,* 929 F.2d at 1489 (emphasis added) (quoting *Imbler,* 424 U.S. at 430-31). Of course, "'actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor.'" *DiCesare v. Stuart,* 12 F.3d 973, 977 (10th Cir. 1993) (quoting *Buckley v. Fitzsimmons,* 113 S. Ct. 2606, 2615 (1993)). Indeed, we have repeatedly found investigative and administrative actions taken by state prosecutors to be adequately protected by the doctrine of qualified, rather than absolute, immunity. *See Pfeiffer,* 929 F.2d at 1490 & n.6 (citing *Rex v. Teeples,* 753 F.2d 840, 843-44 (10th Cir.), *cert. denied,* 474 U.S. 967 (1985)); *accord Snell,* 920 F.2d at 686; *Lavicky v. Burnett,* 758 F.2d 468, 476 (10th Cir. 1985), *cert. denied,* 474 U.S. 1101 (1986).

In making the often "difficult distinction" between prosecutorial and non-prosecutorial activities (*i.e.,* absolute and qualified immunity), we have held "'the determinative factor is "advocacy" because that is the prosecutor's main function.'" *Pfeiffer,* 929 F.2d at 1490 (quoting Rex, 753 F.2d at 843); *Spielman v. Hildebrand,* 873 F.2d 1377, 1382 (10th Cir. 1989). Finally, we have applied a continuum-based approach to these decisions, stating "the more distant a function is from the judicial process and the initiation and presentation of the state's case, the less likely it is that absolute immunity will attach." *Pfeiffer,* 929 F.2d at 1490 (citing *Snell,* 920 F.2d at 687).

Applying these principles to this case, we cannot agree with the district court that a prosecutor's actions in allegedly countermanding a state court judge's order directing a court reporter to prepare transcripts for use by an indigent pro se litigant in a civil action, constitutes the type of conduct protected by absolute immunity under *Imbler* and its progeny. While we are sensitive to the important public policies furthered by absolute immunity, *Snell,* 920 F.2d at 687, we also heed the Supreme Court's admonition that absolute immunity is the exception and not the rule. "We have been quite sparing in our recognition of absolute immunity, and have refused to extend it any further than its justification would warrant." *Burns v. Reed,* 111 S. Ct. 1934, 1939 (1991) (internal quotation marks and citations omitted); *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982) (noting that "[f]or executive officers in general, . . . qualified immunity represents the norm"); *Butz v. Economou,* 438 U.S. 478, 507 (1978); *Spielman* 873 F.2d at 1382.

We find it difficult to see how a prosecutor's actions in contravening the authority of the judicial branch of state government in regard to the defense of a civil action constitute the kind of advocacy related to the initiation and prosecution of criminal proceedings, even under the most generous interpretation of that phrase, to which absolute immunity attaches. *See Spielman,* 873 F.2d at 1382 ("We must therefore determine whether the defendants' actions in this case constituted advocacy functions sufficiently related to initiating judicial proceedings to justify absolute immunity."). Stated alternatively, the actions at issue in this case are simply too far removed on the continuum from the core prosecutorial functions of initiating and pursuing criminal prosecutions to be covered by absolute immunity. We therefore conclude that the Assistant Attorney General has failed to carry her burden, *see Burns,* 111 S. Ct. at 1939, of demonstrating her

entitlement to absolute immunity, and accordingly, we reverse the district court's order of dismissal in this regard.[4]

Due to the district court's disposition of this matter on the basis of absolute immunity, it had no occasion to consider defendant Ritz's alternative argument that qualified immunity was warranted. We therefore remand the case to the district court to decide the applicability, if any, of the defense of qualified immunity under these circumstances.

II.

Mr. Gagan also appeals an issue relating to the district court's order denying his motion for leave to amend his complaint to name the court reporters as additional defendants. The district judge adopted the magistrate judge's recommendation, over Mr. Gagan's objection, to deny the motion to amend the complaint. While we express no opinion as to the propriety of this ruling, *as a matter of federal civil procedure,* we are troubled by the somewhat circular reasoning employed by the court below. In essence, the district court concluded that because the court reporters could avail themselves of qualified immunity under these circumstances, *see Antoine v. Byers & Anderson, Inc.,*

---

[4] While our conclusion on the absolute immunity issue would be the same with respect to the Attorney General herself, we believe the suit against her was properly dismissed, albeit for different reasons.

A supervisor may not be held liable in a § 1983 action under the theory of respondeat superior. *Monell v. Department of Social Serv.,* 436 U.S. 658, 691-95 (1978). The plaintiff must establish some "affirmative link" between the deprivation and personal control by the supervisor in order to establish the supervisor's liability. *Meade v. Grubbs,* 841 F.2d 1512, 1527 (10th Cir. 1988) (citation omitted). Because we find nothing in the complaint that would support such a conclusion, we affirm the dismissal of the action against Attorney General Norton. *See Schepp v. Fremont County,* 900 F.2d 1448, 1454 (10th Cir. 1990) (quoting *Griess v. Colorado,* 841 F.2d 1042, 1047 (10th Cir. 1988) (finding affirmance proper on appeal on any ground where the record is adequate to permit the appellate court to determine the ultimate legal conclusion)).

113 S. Ct. 2167 (1993), their joinder would be futile and therefore the motion to amend should be denied.

Initially, we point out that the defense of qualified immunity, which the district court correctly noted would be the standard of immunity that would apply to a court reporter, is an affirmative defense that must be raised by the party alleging it. *See Gomez v. Toledo,* 446 U.S. 635, 640-41 (1980); Fed. R. Civ. P. 8(c). In this case, however, before the court reporters can raise this defense, the propriety of joining them as defendants must first be determined as a matter of federal civil procedure. Therefore, we must reverse the district court's conclusion and remand for a determination as to the preliminary procedural question of whether Mr. Gagan's motion for leave to amend his complaint is warranted.

If the motion for leave to amend is granted, *see Stichting Mayflower Recreational Fonds v. Newpark Resources, Inc.,* 917 F.2d 1239, 1249 (10th Cir. 1990); *First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.,* 820 F.2d 1127 (10th Cir. 1987), and the court reporter defendants do in fact assert the defense of qualified immunity, then we note the burden of showing that there was a violation of clearly established legal rights is shifted to the plaintiff. *See Applewhite v. United States Air Force,* 995 F.2d 997, 1000 (10th Cir. 1993), *cert. denied,* 114 S. Ct. 1292 (1994); *Medina v. City & County of Denver,* 960 F.2d 1493, 1497 (10th Cir. 1992); *cf. DeLancy v. Caldwell,* 741 F.2d 246, 1247 (10th Cir. 1984) (holding that due process protects against a court reporter's excessive delay in furnishing transcripts).

We therefore REVERSE the district court's order granting the defendants' motion to dismiss on the basis of absolute immunity, and REMAND this case to the district court for a determination as to the availability of qualified immunity. In addition, we REVERSE the district court's order denying the plaintiff's motion to amend his complaint to name additional defendants in so far as the basis for its ruling was a determination on the question of qualified immunity and not a matter of procedure, and REMAND the case for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-Z-655

CARY JAMES GAGAN,

Plaintiff,

v.

GALE NORTON, in her individual capacity as Attorney General for the State of Colorado; and
WENDY RITZ, in her individual capacity as Assistant Attorney General for the State of Colorado

Defendants.

ORDER OF DISMISSAL

Plaintiff Cary James Gagan, appearing pro se, filed this Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 against Gail Norton, in her capacity as Attorney General for the State of Colorado, and Wendy Ritz, in her capacity as Assistant Attorney General for the State of Colorado. Mr. Gagan alleges that his federal civil rights were violated by a several month delay in preparing complete transcripts of the proceedings in his criminal case in state court, a delay Mr. Gagan asserts was intentionally orchestrated by Ms. Norton and Ms. Ritz. In addition, Mr. Gagan requests permission to add two court reporters as defendants, alleging that they, too, contributed to the delay. Defendants filed a motion to dismiss.

Pursuant to D.C.COLO.LR. 72.4, this matter was referred to United States Magistrate Judge Edward O. Schlatter, who filed a Recommendation Of United States Magistrate Judge in which he recommended that defendants' motion to dismiss be granted and that plaintiff's request to add the two court reporters as defendants be denied. Plaintiff has filed objections to the Magistrate Judge's Recommendation. The Court is required to

review de novo all portions of the Magistrate Judge's Recommendation to which objections have been filed. *See* 28 U.S.C. § 636(b)(1).

The main issue presented by this case is whether court reporters are protected by absolute immunity. Because of the lack of Tenth Circuit precedent on point, the Magistrate Judge applied Tenth Circuit decisions holding that activities of a court employee taken either at the direct order of a judge or which are intimately associated with the judicial process are protected by absolute immunity. *See, e.g., Valdez v. City and County of Denver,* 878 F.2d 1285 (10th Cir. 1989); *Tripati v. United States I.N.S.,* 784 F.2d 345 (10th Cir. 1988), *cert. denied,* 484 U.S. 1028 (1988). He also relied on several Seventh and Ninth Circuit cases granting absolute immunity to court reporters, including *Antoine v. Byers & Anderson, Inc.,* 950 F.2d 1471 (9th Cir. 1991) (granting absolute immunity to court reporters because "the tasks performed by a court reporter in furtherance of her statutory duties are functionally part and parcel of the judicial process.").

In June 1993, after the Recommendation was filed, the Supreme Court rejected giving court reporters absolute immunity because they are part of the judicial function, and overruled the Seventh and Ninth Circuit cases relied on by the Magistrate Judge. *Antione v. Byers & Anderson,* 61 U.S.L.W. 4562, 4563 (U.S. June 7, 1993). The Supreme Court stated, "The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." The Supreme Court also cited favorably *McLallen v. Henderson,* 492 F.2d 1298 (8th Cir. 1974) (court reporters not absolutely immune because their duties are ministerial, not discretionary, in nature; granting qualified immunity), and *Green v. Maraio,* 722 F.2d 1013 (2d Cir. 1983) (giving court reporters qualified immunity).

Even if the reporters are protected by qualified rather than absolute immunity, this Complaint still must be dismissed for failure to state a claim upon which relief can be granted. In his complaint, Mr. Gagan asserts that Attorney General Norton and Ms. Ritz directed the reporters to delay the transcripts. This

allegation brings this case directly within the parameters of *Green v. Maraio,* 722 F.2d 1013, 1019 (1983), cited in *Antoine.*

In *Green,* the plaintiff alleged that the court reporter altered transcripts pursuant to the Judge's instructions. Thus the complaint itself established the circumstance required as a predicate to a finding of qualified immunity. The *Green* court held that since the Judge was protected by absolute immunity, "it would be manifestly unfair to allow Maraio to be subjected to liability when she was acting within the scope of the judge's instructions." *Green v. Maraio,* 722 F.2d 1013, 1019 (2d Cir. 1983). *Green,* 722 F.2d at 1019.

The facts are similar in Mr. Gagan's case. Under *Green,* the court reporters are protected from liability if they are acting under orders of a person who is protected. In his Recommendation, Magistrate Judge Schlatter found that Attorney General Norton and Ms. Ritz were protected by prosecutorial immunity, citing *Snell v. Tunnell,* 920 F.2d 673 (10th Cir. 1990), *cert. denied,* 111 S. Ct. 1622 (1991), and *Pfeiffer v. Hartford Fire Insurance Co.,* 929 F.2d 1484 (10th Cir. 1991). Since the transcripts in question had not been part of the record in the state court appeal, there was a legal question as to whether the transcripts could be considered in a federal habeas action. Therefore, any alleged action on the part of Ms. Norton or Ms. Ritz with regard to the transcript would be associated with their role as advocates for the state of Colorado in the federal habeas case. Under *Snell,* they are protected by prosecutorial immunity for such actions, and, if Mr. Gagan's allegations that the court reporters were acting under orders of Ms. Norton and Ms. Ritz are true, the reporters too are protected. Accordingly, it is

ORDERED that Defendants' Motion To Dismiss Complaint With Prejudice is granted, and plaintiff's Complaint filed under 42 U.S.C. § 1983 and this cause of action are dismissed with prejudice. It is

FURTHER ORDERED that Defendants' Motion To Strike Portions Of Plaintiff's Response To Defendant's Motion To Dismiss Complaint With Prejudice is moot. It is

FURTHER ORDERED that the plaintiff's motion to add court reporters as defendants are denied. It is

FURTHER ORDERED that all other pending motions are denied.

DATED at Denver, Colorado, this 14th day of January, 1994.

BY THE COURT:

/s/ ZITA L. WEINSHIENK

ZITA L. WEINSHIENK, *Judge*
United States District Court

January 14, 1994

Civil Action No. 92-Z-655

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of ORDER OF DISMISSAL entered by Judge Zita L. Weinshienk and filed on January 14, 1994, were mailed to the following:

Cary James Gagan
3000 E. Colfax, #272
Denver, CO 80206

LaDonne Bush, Esq.
Hall & Evans
1200 Seventeenth Street
Suite 1700
Denver, CO 80202-5817

Magistrate Judge O. Edward Schlatter

JAMES R. MANSPEAKER, *Clerk*

By: _____
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92 Z 655

CARY JAMES GAGAN,

Plaintiff,

v.

GALE NORTON, in her individual capacity as Attorney General for the state of Colorado, and
WENDY RITZ, in her individual capacity as Assistant Attorney General for the state of Colorado,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Cary Gagan, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983. In his Complaint, the Plaintiff alleges that his federal civil rights have been violated because of a delay in preparing complete transcripts of the proceedings in his criminal case in state court. Mr. Gagan alleges that the Defendants intentionally orchestrated the delay in preparing the transcripts. Mr. Gagan has also moved the court to permit him to add two court reporters as additional defendants, alleging that they contributed to the delay. Mr. Gagan seeks money damages as relief for the alleged violations. The Defendants have filed a Motion to Dismiss, Mr. Gagan has responded and the Defendants have replied. The parties have included several exhibits and affidavits with their various filings.

Pursuant to Rules 603 and 605 of the Local Rules of Practice of the United States District Court for the District of Colorado, this matter has been referred to Magistrate Judge O. Edward Schlatter. Magistrate Judge Schlatter hereby makes the following recommendation.

As Plaintiff is representing himself, his Complaint will be construed liberally. *Haines v. Kerner,* 404 U.S. 519, 520-21 (1972); *Collins v. Cundy,* 603 F.2d 825, 827 (10th Cir. 1979). A complaint must be dismissed if, accepting the allegations as true, it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Meade v. Grubbs,* 841 F.2d 1512, 1526 (10th Cir. 1988). To state a valid claim under §1983 plaintiff must allege that the defendants deprived him of a right secured by the United States Constitution while they acted under color of state law. *Adickes v. S. H. Kress and Co.,* 398 U.S. 144, 150 (1970).

I. FACTS

Mr. Gagan was convicted on felony criminal charges in state court and those convictions were affirmed by the Colorado Court of Appeals in November, 1990. Defendant Wendy Ritz, an Assistant Attorney General with the Colorado Attorney General's office, represented the state of Colorado in Mr. Gagan's appeal. In January of 1991, Mr. Gagan filed a pro se petition for writ of habeas corpus with the United States District Court for the District of Colorado. The Respondents in Mr. Gagan's habeas case were represented by Ms. Ritz. The Respondents filed a response to Mr. Gagan's habeas petition in March, 1991. On March 4, 1991 the United States Magistrate handling Mr. Gagan's habeas petition ordered the Clerk of the Arapahoe County District Court to file the state trial court record with the United States District court for the purpose of resolving Mr. Gagan's habeas petition.

Mr. Gagan feels his attorneys did not raise some legitimate issues in his state court appeal. Therefore, Mr. Gagan felt he needed additional portions of the state court record transcribed for the purpose of his federal habeas action, and possibly for use in post-conviction proceedings in state court. These records had not been transcribed for Mr. Gagan's state court appeal. In March of 1991, Mr. Gagan filed a Motion for Preparation of Transcripts at State Expense with the Arapahoe County District

Court, the state court which conducted Mr. Gagan's criminal trial. Exhibit B to the Complaint. The Motion discusses in detail Mr. Gagan's efforts to obtain relief via his federal habeas case. Ms. Ritz was served with a copy of this Motion. A state District Court judge granted Mr. Gagan's Motion on March 22, 1991 by making a hand written notation on the first page of the Motion. The order did not set a deadline for preparation of the transcripts.

At least three court reporters were involved in reporting the hearings Mr. Gagan sought to have transcribed. On April 11, 1991, one of the court reporters wrote to Mr. Gagan and said she was coordinating the preparation of the requested transcripts among the court reporters involved. Exhibit 2 to Plaintiff's Response to Defendants' Motion to Dismiss Complaint with Prejudice. Although the state court judge had not set a deadline for preparation of the transcripts, the court reporter said in her letter that she expected the transcripts would be complete by July 1, 1991. Although some of the transcripts were completed promptly, Mr. Gagan alleges that the set of transcripts he requested was not fully complete until July 23, 1992. See Plaintiff's Motion to Amend Complaint, filed September 10, 1992, p. 5.

Sometime after the state court had granted Mr. Gagan's motion for preparation of transcripts, Mr. Gagan filed in state court a motion for post-conviction relief under Rule 35(c) of the Colorado Rules of Civil Procedure. Apparently, this motion was filed on or about August 30, 1991. See Defendants' Reply, filed May 26, 1992, pp. 11-12, n. 9. On November 8, 1991, Judge Carrigan of the Federal District Court ordered the Respondents in Mr. Gagan's habeas case to complete the record by supplying various transcripts from the state court. Complaint, ¶26. In January of 1992, the Respondents, through Ms. Ritz, asked Judge Carrigan to reconsider his order to complete the record, asserting that the additional transcripts requested by Mr. Gagan should not be considered in the federal habeas case. Exhibit G to

the Complaint. As noted above, all of the transcripts requested by Mr. Gagan were later prepared and filed in the federal court.

The essence of Mr. Gagan's Complaint is that Ms. Ritz told court reporters Kathleen Heymans and Janice Hibbard, who were responsible for preparing some of the transcripts Mr. Gagan had requested, not to prepare the transcripts. According to Mr. Gagan, Ms. Ritz knew of the state court's order for preparation of transcripts yet, beginning in June of 1991, Ms. Ritz told Ms. Hibbard and Ms. Heymans not to prepare the transcripts. Mr. Gagan also alleges that Gale Norton was personally involved in, and personally approved of, Ms. Ritz's alleged efforts to delay or prevent the preparation of the transcripts.

Ms. Ritz states that she did not know of the state court's order for preparation of the transcripts until March of 1992 and did not speak to any of the court reporters involved in Mr. Gagan's case until after Judge Carrigan entered his November 8, 1991 order to complete the record. Ritz Affidavit, Exhibit 1 to Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss (Ritz Affidavit). According to Ms. Ritz, she did talk with two court reporters shortly after Judge Carrigan's November 8 order. Ritz Affidavit. Ms. Ritz says she told reporter Janice Hibbard that the respondents in the federal habeas case were going to ask the court to reconsider its order requiring production of the transcripts and asked Ms. Hibbard to wait to transcribe the hearings until this issue was resolved. Ritz Affidavit. Ms. Ritz says she did not know of the state court's order until a judge of the Arapahoe County District Court called her in March, 1992, after the judge had been told by court reporter Janice Hibbard that Ms. Ritz had asked Ms. Hibbard not to prepare the transcripts. Ms. Ritz then withdrew the motion for reconsideration filed in Judge Carrigan's court. Ritz affidavit.

After Defendants filed affidavits executed by Ms. Hibbard and Ms. Heymans in support of the Defendants' Motion to Dismiss, Mr. Gagan filed motions to add Ms. Hibbard and Ms. Heymans as defendants in this action. Mr. Gagan alleges

that these court reporters were involved with Ms. Ritz and Ms. Norton in a scheme to deprive Mr. Gagan of the transcripts he needed to successfully prosecute his federal habeas case and his state post-conviction relief motion. According to Mr. Gagan, the final portions of the transcripts he had requested were transcribed and filed only after he had moved to add Ms. Hibbard and Ms. Heymans as defendants in this action.

For the purposes of this recommendation, it is assumed that Mr. Gagan's version of the facts is correct. Thus, it is assumed that Ms. Ritz knew of the state court's order for preparation of the transcripts shortly after it was entered and that, beginning in June of 1991, Ms. Ritz asked court reporters Janice Hibbard and Kathleen Heymans not to prepare or to delay the preparation of certain transcripts.

II. IMMUNITY OF ATTORNEY GENERAL

The United States Supreme Court has held that prosecutors are absolutely immune for activities intimately associated with the judicial process, such as the initiation and prosecution of a criminal case. *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976). *See Snell v. Tunnell,* 920 F.2d 673 (10th Cir. 1990) *cert. denied,* U.S. , 111 S. Ct. 1622 (1991). The United States Court of Appeals for the Tenth Circuit has held that absolute prosecutorial immunity also protects state attorneys pursuing civil proceedings on behalf of the state. *Pfeiffer v. Hartford Fire Insurance Co.,* 929 F.2d 1484 (10th Cir. 1991). Prosecutorial immunity is applicable even if it leaves "the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Imbler,* 424 U.S. at 427. *See also Campbell v. Maine,* 787 F.2d 776, 778 (lst Cir. 1986) (no bad faith exception to absolute immunity of prosecutor).

In the present case, Mr. Gagan alleges that Ms. Norton and Ms. Ritz attempted to delay or prevent the preparation of transcripts in an effort to impede or defeat Mr. Gagan's efforts to

secure federal habeas corpus relief and possibly state post-conviction relief. Even if these allegations are true, the absolute immunity rule of *Imbler* and *Pfeiffer* protects Ms. Norton and Ms. Ritz.

At the time Ms. Ritz is alleged to have told the court reporters not to prepare the transcripts, Ms. Ritz was the attorney of record for the state of Colorado in Mr. Gagan's federal habeas corpus action. When Mr. Gagan asked the state court to order preparation of the transcripts, the federal habeas case was the only pending action to which the transcripts might have been relevant. Mr. Gagan's motion for preparation of the transcripts refers repeatedly to his need for the transcripts in the federal habeas proceeding, and mentions only obliquely the possibility of seeking postconviction relief in the state court.

There is no question that the preparation of the transcripts was directly related to the federal habeas case. The fact that the transcripts in question had not been part of the record in Mr. Gagan's state court appeal does raise some question as to whether the transcripts could properly be considered in a federal habeas action. *See Rose v. Lundy,* 455 U.S. 509 (1982) (federal habeas court should not consider claims unless state courts have had an opportunity to consider same claims). Thus, for the purpose of the federal habeas action, there was a legitimate question of whether the transcripts needed to be prepared. In such circumstances, it is common for attorneys to work with court reporters to coordinate when, or whether, transcripts should be prepared. Ms. Norton's and Ms. Ritz's alleged actions with regard to the transcripts, whether proper or not, were intimately associated with their roles as advocates for the state of Colorado in the federal habeas case. Thus, absolute immunity protects Ms. Norton and Ms. Ritz from liability for money damages based on these actions.

III. IMMUNITY OF COURT REPORTERS

Mr. Gagan has filed motions to add two court reporters as defendants in this action. These reporters, Janice Heymans and Kathleen Hibbard, were involved in preparing some of the transcripts requested by Mr. Gagan. Mr. Gagan has alleged that Ms. Heymans and Ms. Hibbard intentionally delayed or tried to prevent the preparation of certain transcripts, at the request of Ms. Ritz. Mr. Gagan alleges that these actions caused substantial delays in his effort to obtain post-conviction relief in the state court and habeas corpus relief in the federal court. Mr. Gagan also alleges that Ms. Heymans and Ms. Hibbard filed misleading and/or false affidavits, again at the request of Ms. Ritz or her counsel, in Mr. Gagan's federal habeas corpus case and in the present case.

Court employees are protected by quasi-judicial immunity for actions they take at the behest of a judge. *See e.g. Valdez v. City and County of Denver,* 878 F.2d 1285, 1287-89 (10th Cir. 1989). In the present case, Mr. Gagan alleges that Ms. Heymans and Ms. Hibbard delayed in preparing transcripts in his case despite the fact that a state court judge had ordered that the transcripts be prepared. The federal circuits are split on whether quasi-judicial immunity extends to the actions of court employees which are within the scope of their duties but not based on the specific direction of a judge. *See e.g. Antoine v. Byers & Anderson, Inc.,* 950 F.2d 1471 (9th Cir. 1991), *cert. denied,* U.S. , 113 S. Ct. 320 (1992) (court reporter who failed to prepare transcripts despite repeated court orders to do so protected by quasi-judicial immunity; reporter's actions were part of court's adjudicatory function); *Rogers v. Bruntrager,* 841 F.2d 853 (8th Cir. 1988) (clerks have absolute immunity for actions they are specifically required to do under court order or at judge's direction; only qualified immunity for all other actions). The Tenth Circuit has not ruled on the issue of whether quasi-judicial immunity protects acts of court reporters related to the preparation of a transcript or the acts of court employees which are within the scope of their duties but not based on the specific

direction of a judge. Assuming Mr. Gagan's allegations to be true, the magistrate judge finds that Ms. Heymans and Ms. Hibbard are protected by absolute immunity.

The United States Courts of Appeal for the Seventh and Ninth Circuits have both held that absolute immunity protects court reporters against law suits alleging that they wrongfully altered a transcript or delayed in preparing a transcript. *Scruggs v. Mollering,* 870 F.2d 376 (7th Cir.), *cert. denied,* 493 U.S. 956 (1989) (judicial personnel who perfom nonmechanical functions integral to the judicial process absolutely immune from damages lability for acts performed in the discharge of those functions; court reporters alleged to have falsified transcript); *Dieu v. Norton,* 411 F.2d 761 (7th Cir. 1969) (absolute immunity shields court reporter from suit alleging that reporter deprived plaintiff of a transcript; actions at issue involved reporter's official responsibilities); *Antoine v. Beyers & Anderson, Inc.,* 950 F.2d 1471 (9th Cir. 1991), *cert. denied,* U.S. , 113 S. Ct. 320 (1992) (court reporter who failed to produce transcript for three years, despite several court orders, protected by absolute immunity; court reporting part of adjudicatory function). The Fifth and Eighth Circuits have held that court reporters are protected by qualified immunity. *Slavin v. Curry,* 574 F.2d 1256 (5th Cir. 1978), *modified,* 583 F.2d 779 (alteration of transcript); *Holt v. Dunn,* 741 F.2d 169 (8th Cir. 1984) (delay in preparation of transcript).

The Tenth Circuit has held that the activities of a court employee which are intimately associated with the judicial process are protected by absolute immunity. *Tripati v. United States I.N.S.,* 784 F.2d 345 (10th Cir. 1986), *cert. denied,* 484 U.S. 1028 (1988). In *Tripati* the court held that probation officer is protected by absolute immunity for actions taken in the course of preparing and submitting a presentence report to a judge. The court concluded that the selection of an appropriate sentence in a criminal case is an important part of the judicial process and probation officers who assist in these determinations play critical roles in the process. Similarly, the actions of a court reporter in

preparing a record for review by another court are also critical to the judicial process. Review of the actions of a trial court is usually impossible without a transcript of the proceedings prepared by a court reporter. Appellate or collateral review of both civil and criminal cases is an important part of the judicial process and court reporters are indispensable to that process. Therefore, the rationale of *Tripati* applies to the present case as well.

A variety of other factors have been cited as relevant in considering whether absolute immunity is applicable to a particular situation. In *Cleavinger v. Saxner,* 474 U.S. 193 (1985), the Supreme Court noted several such factors:

> "(a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal."

Id., p. 202. The Tenth Circuit has summarized these considerations as balancing the right of citizens to seek redress for wrongs committed by government officials versus the need for such officials to be free from the prospect of being called to defend themselves against suits for acts done in the course of their duties. *G.M. Leasing Corp. v. U.S.,* 560 F.2d 1011, 1013 (10th Cir. 1977), *cert. denied,* 435 U.S. 923 (1978).

In the present case, an examination of these factors weighs in favor of the application of absolute immunity. First, there is a need to assure that court reporters can perform their functions without harassment and intimidation. As has been noted many times, the adversary nature of a trial presents a significant danger that dissatisfied litigants will vent their wrath on clerks, court reporters and other court employees. *See e.g. Scruggs v. Mollering,* 870 F.2d 376, 377 (7th Cir.), *cert. denied,* 493 U.S. 956 (1989).

Although some such suits have merit, many others would likely be nothing more than an expression of a litigants frustration. In the case of court reporters, such suits would sap the time and resources of court reporters while impeding their ability to perform their primary duty.

Second, there are a variety of safeguards which serve to control improper conduct by court reporters and ensure that errors can be corrected on appellate collateral review, despite problems obtaining a trial court record from a court reporter. In the present case, safeguards in state trial court and appellate court procedures and safeguards in federal habeas corpus procedure are most relevant because these are the procedures Mr. Gagan sought to use to correct alleged errors at his criminal trial. A trial judge has the power to order production of a transcript and to set deadlines for preparation of transcripts. Failure to comply with such an order puts a court reporter at risk of loss of employment and being cited for contempt of court. A court reporter is also subject to a suit for injunctive relief concerning the preparation of a transcript. *See Pulliam v. Allen,* 466 U.S. 522 (1984). For the purpose of a hearing under Rule 35(c) of the Colorado Rules of Criminal Procedure, the rule permits the introduction of evidence to supplement or substitute for the trial court record at a Rule 35(c) hearing. On appeal, the trial court record may be reconstructed, through the use of a substitute reporter or other means, under Rule 10(c) & (d) of the Colorado Appellate Rules. If reconstruction of the record is inadequate, then reversal and remand for a new trial is required. *People v. Killpack,* 793 P.2d 642 (Colo. App. 1990).

In a habeas corpus action concerning a state criminal conviction, a petitioner may obtain an order from the federal court requiring preparation of a transcript, as was done in this case. Rule 5, Rules Governing Section 2254 Cases in the United States District Courts (Habeas Corpus Rules). If a transcript, or a portion thereof, is unavailable, the petitioner may rely on a narrative summary of the evidence. Rule 4, Habeas Corpus

Rules. In the alternative, when the missing record concerns factual issues related to the petitioner's claims, the petitioner may generally object to the use of substituted records and insist on a hearing. *See Townsend v. Sain,* 372 U.S. 293, 318-19 (1963), *overruled on other grounds by Keeny v. Tamayo-Reyes,* U.S. , 112 S.Ct. 1715, 1717 (1992); *United States v. Butt,* 731 F.2d 75, 77 (1st Cir. 1984); *Little Light v. Crist,* 649 F.2d 682, 686 (9th Cir. 1981).

Finally, it should be noted that the allegations of Mr. Gagan's Complaint present a circumstance in which the Defendants who allegedly directed the effort to delay and/or deny transcripts to Mr. Gagan, Ms. Norton and Ms. Ritz, are clearly protected by absolute immunity. It would be quite unfair to deny the same protection to the court reporters who allegedly followed the attorneys' directions. *See Valdez v. City and County of Denver,* 878 F.2d 1285 (10th Cir. 1989) (unfair to give judges who issue orders protection of absolute immunity while denying same protection to court officers who obey those orders).

The factors discussed above weigh in favor of absolute immunity for court reporters with regard to their actions in preparing a court record. A court reporter's actions in preparing a court record for review on appeal or in other post-conviction proceedings are activities intimately related to the judicial process and therefore entitled to the protection of absolute immunity. The other safeguards discussed above provide a variety of means to resolve problems with trial court records short of damages suits against court reporters. The other factors mentioned by the *Cleavinger* but not discussed above, insulation from political influence and the importance of precedent, carry little weight in this particular situation. In this case, absolute immunity prevents Mr. Gagan from obtaining monetary relief for what he claims are intentional wrongs by government officers. This is the result of the less than perfect balance which must be struck in applying absolute immunity; a balance described well by Judge Learned Hand: "In this instance is has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the

constant dread of retaliation." *Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).

IT IS THEREFORE RECOMMENDED that Defendants' motion to dismiss be granted and Plaintiff Cary Gagan's Complaint be dismissed. IT IS FURTHER RECOMMENDED that Mr. Gagan's motions to add court reporters Janice Hibbard and Kathleen Heymans as defendants be denied.

FURTHER, IT IS ORDERED that under Rules 603 and 605 of the Local Rules of Practice of the United States District Court for the District of Colorado, the parties shall have ten (10) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. FED. R. CIV. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz,* 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within ten (10) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn,* 474 U.S. 140, 155 (1985); *Moore v. United States,* 950 F.2d 656, 659 (10th Cir. 1991); *Niehaus v. Kansas Bar Ass'n.* 793 F.2d 1159, 1164 (10th Cir. 1986).

DATED this 5 day of February, 1993.

BY THE COURT:

/s/ O. EDWARD SCHLATTER

O. EDWARD SCHLATTER
United States Magistrate Judge

Case No. 92-Z-655

CERTIFICATE OF MAILING:

I certify that I have duly mailed a copy of the foregoing Order and Recommendation of United States Magistrate to the following:

Cary James Gagan
3000 East Colfax, #272
Denver, CO 80222

David R. Brougham, Esq.
LaDonne Bush, Esq.
1200 Seventeenth Street
Suite 1700
Denver, CO 80202

Dated: February 5, 1993

/s/ LAURA SCHRAEDER

Secretary to Magistrate
Judge Schlatter

APPENDIX D

DISTRICT COURT, COUNTY OF ARAPAHOE, COLORADO

Case No. 86 CR 451, Division 11

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

v.

CARY GAGAN,

Defendant.

ORDER

This matter is before the Court on the letter of Chief Judge Kenneth K. Stuart to Mr. Cary James Gagan dated March 19, 1992, and the letter with attachments from Cary James Gagan to Chief Judge Stuart dated March 16, 1992. The Court has thoroughly reviewed the file in this case, has spoken with two court reporters (out of four court reporters) involved in these matters, two court reporters having been unavailable by telephone over the last day and one-half, and to Wendy Ritz, Assistant Attorney General. Based on this review the Court finds as follows:

On or about March 22, 1991, Chief Judge Steinhardt issued an order granting Mr. Gagan's motion for preparation of transcripts at State expense. Transcripts of court proceedings, if there were any, were ordered to be prepared for the following dates in cases 86CR451 and 86CR539:

July 22, 1987
July 24, 1987
July 27, 1987
August 31, 1987
September 15, 1987
September 18, 1987
October 2, 1987
October 5, 1987
November 13, 1987
December 21, 1987
December 30, 1987
February 8, 1988
February 9, 1988
February 25, 1988
February 29, 1988
March 1, 1988
May 18, 1988

By April 1, 1991, lead court reporter, Rosemary DeMartini was contacted to prepare transcripts and she in turn, upon information and belief contacted reporters Janice Hibbard, Jennifer Mastalka and Kathleen Heymans, to transcribe notes of theirs. By letter dated April 1, 1991, Gregory C. Langham, District Administrator 18th Judicial District, so notified Mr. Gagan. By letter dated April 11, 1991, Ms. DeMartini informed Mr. Gagan, with copies to relevant court reporters, that preparation of transcripts was under way and anticipated completion date was July 1, 1991. Kathleen Heymans has in fact completed her transcript, and an affidavit that on one requested date there was not in court proceeding on these cases. The other transcripts have not been prepared.

This Judge was informed by court reporter Janice Hibbard on March 23, 1992, that she stood ready, willing and able to transcribe these proceedings and had already pulled her notes to do so, but that she had been instructed by Assistant Attorney General Wendy Ritz not to comply with Chief Judge Steinhardt's order and instructed not to prepare the transcripts. In a telephone conversation between this Judge and Ms. Ritz on March 24, 1992, Ms. Ritz confirmed this; to wit, that she did not think these transcripts were necessary and that she instructed the court reporter not to prepare court ordered transcripts. She never notified this Court of her instructions and this Court was under the impression that transcripts were being prepared.

Ms. Ritz unilaterally countermanded a District Court order. Her conduct is quite frankly outrageous. This Court knows of no authority for such action. This Court so informed Ms. Ritz. She was further informed never to proceed in such a fashion again.

If Ms. Ritz disagrees with a court order, there are formal means to present this to the Court, or to a higher Court, for consideration instead of ignoring a Court order and telling others to also ignore that order. Even if Ms. Ritz does no believe these transcripts are necessary for federal proceedings,

Mr. Gagan has ongoing proceedings in this case and Ms. Ritz has affected these proceedings.

In addition, by order of November 8, 1991, Judge Carrigan *ordered* that certain transcripts be prepared which Ms. Ritz had previously told the court reporters not to prepare. Although she clearly knew of Judge Carrigan's order, upon information and belief, she never recontacted the reporters to inform them that they were now under two court orders to prepare these transcripts.

It is hereby ordered that Ms. Ritz cease and desist from further interference or countermanding of orders of the District Court, Arapahoe County; that Court reporters Rosemary DeMartini, Janice Hibbard and Jennifer Mastalka prepare transcripts of the proceedings in this case on the dates listed above and file them with the Arapahoe District Court within 30 days. This Court will transmit the transcripts to federal court as needed and will make use of the transcripts in this case as appropriate.

DONE and signed in open court this 25th day of March, 1992.

BY THE COURT

/s/ DEANNA E. HICKMAN

DEANNA E. HICKMAN
District Court Judge

APPENDIX E

DISTRICT COURT, COUNTY OF ARAPAHOE, COLORADO

Case No. 86 CR 451 and 86 CR 539, Division 11

ORDER

PEOPLE OF THE STATE OF COLORADO,

Plaintiffs,

v.

CARY GAGAN,

Defendant.

This matter is before the Court on a Motion to Reconsider. The Court has reviewed the Motion and the response filed by Mr. Gagan. Although the Motion contained no affidavits, the response filed by Mr. Gagan contained affidavits from Ms. Ritz and Ms. Hibbard. The information in the affidavits was not communicated to this Court by either affiant. At no time did they tell this Court that they were unaware of Judge Steinhardt's order. However, in light of their statement that they were unaware of Judge Steinhardt's order, the Court will withdraw its opinion in part. All of the order will be withdrawn except that portion ordering transcripts prepared within 30 days. Three transcripts are still outstanding from Judge Steinhardt's order to wit:

In one or more of these cases 86DR451, 86CR539, 87CR1477 on dates July 24, 1987, October 2, 1987, October 5, 1987.

Upon information and belief Janice Hibbard was the court reporter on some of these dates. The transcript clerk informs me these still have not been prepared. These transcripts shall be prepared within 30 days.

DONE and signed in open court this 1st day of June, 1992.

BY THE COURT:

/s/ DEANNA E. HICKMAN

DEANNA E. HICKMAN
District Court Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 91-C-0005

CARY JAMES GAGAN,

Petitioner,

v.

FRANK GUNTER AND ATTORNEY GENERAL
FOR THE STATE OF COLORADO

Respondents.

ORDER

Upon consideration of Petitioner's Motion to Complete the Record,

IT IS ORDERED that Respondents complete the record by supplying the following:

1. In Cases 86-CR-539 and 86-CR-451,
   a. Pages 174-179, Volume 14;
   b. Transcript of July 22, 1987 hearing (in chambers);
   c. Transcript of July 24, 1987 hearing;
   d. Transcript of September 15, 1987 hearing (bail);
   e. Transcript of September 18, 1987 hearing (writ);
   f. Transcript of November 13, 1987 hearing (extradition); and
2. In Case No. 87-CR-1477,
   a. Transcript of October 5, 1987 hearing in 87-CV-1477.

IT IS SO ORDERED.

Dated this 8th day of November, 1991.

BY THE COURT:

/s/ JIM R. CARRIGAN

JIM R. CARRIGAN
U. S. District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-Z-655

CARY JAMES GAGAN,

Plaintiff,

vs.

GALE NORTON, in her individual capacity as Attorney General for the State of Colorado; and
WENDY RITZ, in her individual capacity as Assistant Attorney General for the State of Colorado,

Defendants.

AFFIDAVIT OF WENDY J. RITZ

I Wendy J. Ritz, having been duly sworn, state as follows:

1. I am an Assistant Attorney General for the State of Colorado.

2. In February of 1988, Cary James Gagan was convicted in the District Court of Arapahoe County on two counts of theft, two counts of criminal attempt to commit theft, and two counts of criminal impersonation. Mr. Gagan was sentenced to four years on count one and eight years on each of the other counts, to be served concurrently.

3. When Mr. Gagan appealed his state court conviction, I represented the People of the State of Colorado in the appeal. The Colorado Court of Appeals affirmed the judgment of conviction in *People v. Gagan,* No. 88CA0916, 88CA0982 (Colo. App. May 24, 1990) (not selected for official publication), *cert. denied,* November 13, 1990.

4. I have not spoken to Gale Norton about Mr. Gagan's appeal.

5. On January 7, 1991, Mr. Gagan filed a petition for writ of habeas corpus in the United States District Court for the District of Colorado (Civil Action No. 91-C-0005) naming Frank Gunter and the Attorney General of the State of Colorado as respondents. On behalf of the respondents, I filed an answer to show cause in the United States District Court on February 11, 1991.

6. On March 4, 1991, United States Magistrate Richard Borchers ordered the Clerk of the District Court of Arapahoe County to file the state trial court record with the Clerk of the United States District in Civil Action No. 91-C-0005.

7. In March 1991, Mr. Gagan filed his pro se "Motion for Preparation of Transcripts at State Expense" in the Arapahoe County District Court in Case Nos. 86CR539/86CR451. The Motion states in part:

> That the below requested transcripts involve proceedings in the above cases, and that these proceedings involve issues related to the speedy trial claims being reviewed by the United States District Court For the District of Colorado in Civil Action No. 91-C-0005.

Mr. Gagan's Motion is attached as Exhibit B to his "Complaint 42 U.S.C. 1983", and the quoted language appears on page 1.

8. Mr. Gagan sent me a copy of his March 1991 motion when he filed it. I then sent a copy of the motion to the Arapahoe County District Attorney's Office because the District Attorney's Office represents the interests of the People at the state trial court level. The Attorney General's office was not a party to the proceedings in Arapahoe County, and I did not receive any notice from the District Court regarding any action taken on Mr. Gagan's motion.

9. On May 10, 1991, the Federal Public Defender's office was appointed to represent Mr. Gagan in Civil Action No. 91-C-0005.

10. On November 7, 1991, Mr. Gagan by his counsel, Vicki Mandell-King (an Assistant Federal Public Defender), filed a "Motion to Complete Record" in Civil Action No. 91-C-0005, which indicated that transcripts from several proceedings had not been included in the state court record transmitted to the United States District Court.

11. By Order entered on November 8, 1991, Judge Jim R. Carrigan ordered the respondents in Civil Action No. 91-C-0005 to complete the record by supplying various transcripts.

12. I did not have any communications with any court reporters about the transcripts requested by Mr. Gagan until after I received Judge Carrigan's Order.

13. After receiving Judge Carrigan's Order, I contacted the Clerk of the Arapahoe County District Court and the Arapahoe County District Attorney's Office to determine if the requested transcripts existed. No one in either office informed me that there was an existing state court order to prepare the transcripts.